

OPERATING PRINCIPLES FOR AN INTEGRATED EPA ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM

Interim Final -- 11/18/96

I. INTRODUCTION

The purpose of this document is to articulate a set of operating principles for the Environmental Protection Agency's (EPA) enforcement and compliance assurance program. This document is designed to provide program managers and staff with a set of principles which: defines each of the tools in the program; describes the appropriate use of those tools; describes our approach to measuring success; and provides a general framework for program planning and decisionmaking.

II. BACKGROUND

America's last twenty-five years of environmental improvements are attributable to a strong set of environmental laws and an insistent and enforced expectation of compliance with those laws. Preserving and building on those improvements and successfully addressing a new generation of environmental problems will require the combined and sustained efforts of all levels of government, regulated entities (both public and private), and the public. Government must target significant environmental and noncompliance problems, develop and use a range of tools to address those problems, apply its authorities in a fair and consistent manner, and measure the results of its efforts. Regulated entities are expected to obey the law and bear responsibility for prevention and correction of environmental problems. Citizens must be able to obtain information and hold industry and government accountable.

Throughout the past twenty-five years, the EPA has relied on a strong, aggressive enforcement program as the centerpiece of its efforts to ensure compliance with national environmental laws. This approach has served the nation well, and has created a culture of environmental compliance that is unsurpassed in the world. Indeed, in response to enforcement efforts a professional class of environmental managers within the regulated sector has emerged, managing people and systems oriented toward compliance and pollution prevention.

Today, we must apply a full range of approaches to motivate compliance and build on our past success. EPA has consolidated its headquarters enforcement programs and taken steps to enhance coordination and integration of enforcement implementation. Established enforcement tools have been refined and strengthened. Formal law enforcement surely will continue to be the central and indispensable element of effective governmental efforts to ensure compliance. Additional tools and capabilities for ensuring compliance have been developed. Improved measures of success are being developed and used. This document attempts to articulate a set of core principles to guide the Agency's program (Section III), define the tools and discuss the best opportunities for their use (Section IV), and provide principles about the integration of those tools (Section V).

III. CORE PRINCIPLES

1. The goal of EPA's enforcement and compliance assurance program is to bring about environmental protection through immediate, full and continuous compliance with all Federal environmental laws and requirements and to address past, present, and future threats to public health and the environment. This goal is most likely to be achieved when:

- a)** The governmental response to violations is fair, predictable and increasingly severe as the scope, duration, significance, wilfulness and economic advantage gained by violators increases;
- b)** The statutory and regulatory requirements are clearly articulated, and are widely known and understood within the regulated community;
- c)** There is no economic advantage for violators compared to those who timely comply; there is a "level playing field" and it does not pay to violate;
- d)** The regulated community sees that proactive self-disclosing and self-correcting activities are preferable to the consequences of a government enforcement action;
- e)** Awaiting governmental (or citizen) response to noncompliance results in adverse consequences significantly greater than any economic advantage gained by delaying compliance;
- f)** There is a reasonable likelihood that violations will be detected by government or others (e.g. citizens, whistle blowing employees);
- g)** Adverse governmental responses to violations are publicized and well known.

2. Because government will never be able to bring about compliance at every regulated facility through direct intervention on a facility-by-facility basis, government must maximize its effectiveness through deterrence, publicizing cases, and support of effective efforts by citizens and

all levels of government. Governmental efforts must motivate and enhance the capacity and will of the regulated community to promptly and fully comply with the law, to voluntarily and promptly disclose and correct violations before they come to the attention of government, and to respond proactively to releases of substances into the environment for which they are responsible.

3. In programs where states and tribes are delegated and/or authorized to operate and enforce federal environmental laws, there are important and complementary state, local, tribal and federal roles in enforcing and assuring compliance with such laws. The base-line or minimum federal role is described in the February 21, 1996 EPA document entitled "Core EPA Enforcement and Compliance Assurance Functions."

4. EPA is accountable to the public for its actions, and therefore will report on the amount and types of enforcement and compliance assurance activities it undertakes, measure the environmental impact and results of those activities, and assess industry performance through industry sector compliance rates.

5. These principles apply equally to the public and private sector, and with full force to requirements which ensure disclosure of vital information to the government and the public, in addition to requirements which prevent, reduce, or control pollution.

6. EPA's enforcement of site remediation laws and regulations should encourage parties that are legally responsible for responding to releases of substances into the environment to respond proactively to those releases.

IV. ENFORCEMENT AND OTHER COMPLIANCE ASSURANCE TOOLS

This section defines the enforcement and compliance tools -- civil and criminal enforcement, compliance monitoring, compliance incentives and compliance assistance -- and describes the best opportunities for their use.

A) CIVIL AND CRIMINAL ENFORCEMENT

Civil and criminal environmental enforcement have proven to be very effective tools. Such enforcement serves the following purposes:

- remedies the environmental harm caused by environmental violations and prevents future environmental harm from occurring;
- addresses conditions which may present an imminent and substantial endangerment to human health, welfare or the environment;

- addresses violations of the law and ensures that all necessary steps are taken to achieve and maintain compliance with the applicable requirements of federal environmental laws and regulations;
- deters others from similar illegal behavior;
- “levels the economic playing field” by ensuring that those who violate the law do not enjoy an economic advantage over those who comply;
- recovers the government’s costs for environmental response actions (e.g., CERCLA and OPA actions);
- implements site remediation provisions of the environmental laws.

1. Definitions and Opportunities for Use

a) Written notices of violation. A written notice of violation, when used alone, is best suited for minor, inadvertent, first-time violations. Under some statutes (e.g., CAA, SDWA), notices of violation are legal prerequisites to proceeding with more serious formal enforcement responses. Under other laws, such notices or warnings are not legally required and are appropriate principally where the violations at issue have little or no environmental or regulatory significance or impact on economic competition with complying firms. Oral notices of violation, which are not reduced to writing in the inspection report, are rarely appropriate as the sole enforcement response.

b) Judicial and administrative orders, judicial and administrative penalty actions, and cost recovery actions. EPA will address violations discovered through regular inspections, tips, complaints, or other compliance monitoring with penalty actions or orders, or both, and in the case of the significant expenditure of government funds (e.g., remediation) with cost recovery actions.

Standard civil enforcement actions take three separate forms: penalty actions, orders, and cost recovery actions. A single set of facts often requires some combination of these three, as they serve distinct purposes.

i) Orders (both administrative and judicial, and both unilateral and on consent) serve four purposes: 1) to return violators to compliance; 2) to ensure their continued compliance; 3) to remedy environmental harm; and 4) to keep new environmental harm from occurring. As such, orders provide legal assurance that the regulatory system will be respected in the future, that the environment will be restored, or that the environment will be protected in the future. They have some specific deterrent effect, but without penalties they will not serve as a general deterrent.

Opportunities for Use. Orders and other forms of injunctive relief are most effective in bringing violators into compliance and ensuring their future compliance with regulatory requirements, especially if compliance is to be achieved through the implementation of a compliance schedule or similar milestones.

ii) Penalties serve to level the economic playing field, and as such EPA penalty policies usually include recapture of at least the economic benefit of noncompliance. Civil judicial and administrative penalties serve the important role of deterring violators and ensuring that noncompliers do not enjoy or gain a competitive advantage over competitors who have invested time and money in achieving compliance.

Much of the success of other tools, such as compliance assistance and compliance incentives, relies on a general expectation in the regulated community that there is a substantial risk that violations discovered by government will be the subject of enforcement actions with sanctions. Penalties can serve as an incentive to the violator to address and prevent other violations, including violations at different facilities or under different statutory requirements. Moreover, for the regulatory system as a whole to work, voluntary compliance for all facilities and entities will likely improve greatly when the regulated community expects enforcement penalties as a response to violations.

Opportunities for Use. Penalties are most effectively used for noncompliance which adversely impacts the environment, the integrity of our regulatory framework, or the “economic playing field”. Penalties must be substantial enough to erase the economic gain of noncompliance, and create specific and general deterrence.

In some cases, as set out in the Supplemental Environmental Projects (SEP) policy, penalties can be mitigated in light of action taken by the violator to improve the environment directly. In such cases, penalties in combination with a SEP can address environmental harm in addition to leveling the economic playing field and serving as a deterrent.

iii) Cost recovery actions implement the principle that polluters, rather than the general public, should pay for the damage they cause and the cost of cleaning it up.

c) Criminal enforcement. Criminal prosecution is the strongest sanction that the government has to address violations.

While decisions whether to prosecute criminal violations of federal law rest within the Department of Justice, EPA exercises considerable influence upon such decisions through its investigation, development and referral of criminal cases. In this regard, EPA has established certain general principles to guide the operation of its criminal enforcement program, including the identification of nine specific criteria for determining whether a particular violation is appropriate for criminal investigation. (See E. Devaney, “The Exercise of Investigative Discretion”, Office of Criminal Enforcement, Jan. 12, 1994.) As indicated in that document,

criminal proceedings are best suited for those instances where the strong deterrent impact of criminal sanctions is especially needed, both upon the specific violator and upon the regulated community in general. They are most often used where the conduct in question is particularly egregious, or the harm caused or threatened to public health or the environment is the most severe, or both. Criminal prosecutions are also important in those instances where those who are required by law to provide sampling results, scientific data, or other information to governmental agencies fail to do so in an accurate and timely manner, thereby impeding the ability of those agencies to fulfill their regulatory missions.

Criminal sanctions frequently can be employed to impose terms of imprisonment upon individuals and fines upon both individuals and organizations. Criminal enforcement authority can lead to settlements which include requirements for environmental restoration, restitution to government and to others for damages incurred (similar to cost recovery in civil actions), and other requirements designed to recapture economic benefit and to ensure future compliance.

B. COMPLIANCE MONITORING

1. Definition and Description

Compliance monitoring consists of actions: 1) to determine compliance with applicable laws, regulations, permit conditions, orders and settlement agreements (including remediation requirements); 2) to review and evaluate the activities of the regulated community or potentially responsible parties (PRPs) under Superfund; and 3) to determine whether or not conditions presenting imminent and substantial endangerment may exist. The most common regulatory compliance monitoring activities are surveillance, inspections, information-gathering, and record reviews. Common remediation compliance monitoring activities for work required by permit, order, or settlements include ensuring timely submissions, review of submittals for adequacy, and oversight of remediation actions. Elements of these activities include sampling, sample analysis, observations, issuance of information requirement letters or subpoenas, and ensuring data quality.¹

Compliance monitoring includes a wide range of activities in six basic categories which may overlap:

a) Surveillance is generally a pre-inspection activity which consists of obtaining general site information prior to actually entering the facility. Surveillance may include such things as ambient sampling at the property line, or observations of activity at the site.

b) Inspections (on site) may include sampling, observations, record reviews, interviews, etc., and have traditionally been confined to one media. EPA is currently pursuing an integrated

¹Compliance monitoring may be performed by the regulated entity as self-monitoring or self-auditing. Because this document focuses on actions which are initiated by regulatory agencies, these activities will not be further discussed here.

program where multi-media inspections are performed within an entire eco-system or geographic area, or on a facility or industry sector-wide basis.

c) Investigations are generally more comprehensive than inspections and may be warranted when an inspection or record review suggests the potential for serious, widespread, and/or continuing civil or criminal violations.

d) Record reviews may be conducted at various locations, such as at EPA's offices, at state or local offices, or at the facility, and may or may not be combined with field work. Records may be derived from routine self-monitoring requirements, citizen/employee tips, or remote sensing such as aerial photography, geophysical satellite data, infrared photography, etc.

e) Targeted information gathering may be used to provide or acquire more accurate information on the status of compliance and/or environmental conditions. A facility, business, or PRP may be required to: report information such as emission/discharge rates, the nature of a release of a hazardous substance, or the status of remediation at a Superfund site; verify the purchase, installation, and use of pollution control equipment; or submit operating logs or financial records. Information may be sought on facility or operator ownership, compliance history, sampling results, production processes or materials. Stack tests or other compliance demonstrations may be required.

2. Opportunities for Use

a) On-site inspections are most often used to determine compliance and detect violations. There are two primary methods of targeting these inspections:

i) Neutral Inspection Scheme: A certain randomly selected portion of regulated entities in a given category should be inspected to acquire an indication of the overall compliance rate of that class of entities. It should be noted however, that random inspection schemes may be developed according to strategies which consider such aspects as source or sector non-compliance rates, potential human health or environmental risk associated with an industry, size of business, etc. Random inspections also encourage compliance because entities do not want to be caught noncomplying.

ii) Targeted Inspections: EPA may inspect certain facilities to address a known, suspected or perceived risk to human health or the environment. Targets may be selected for a variety of reasons: ambient data analysis which shows a high risk; a spill or other environmental incident (for cause); a request by a state or a tribe; a response to a citizen or whistle blower tip or complaint; or to address community concerns.

b) Compliance monitoring activities can also be used after violations have been detected and an enforcement response undertaken. Inspections and other activities can be used to monitor the

status of compliance with settlements or orders and thereby assess the effectiveness of specific legal actions, ensure that the original or subsequent violations are corrected and the facility returns to compliance, and to deter and properly respond to violations of such settlements and orders.

c) Compliance monitoring may also involve remote pollution monitoring to support risk-based inspection targeting, to supplement planned inspections (such as emissions test inspections), or to document changes in emissions after an inspection or enforcement action.

C. COMPLIANCE INCENTIVES

1. Definition and Description

Compliance incentives refer to those policies that encourage regulated entities to voluntarily discover, disclose and correct violations or clean up contaminated sites before they are identified by the government for enforcement investigation or response. These voluntary compliance efforts generally fall into two categories:

a) **Audit and compliance management** programs that are developed and maintained by the regulated community;

b) **Partnerships** between government and industry, such as the Environmental Leadership Program;

These efforts require the regulated community to volunteer or participate in the discovery of violations or cleanup of past contamination.

2. Opportunities for Use

a) **Combined with deterrence:** Compliance incentives are more likely to encourage the regulated community to identify, disclose and correct violations before they are detected by government in an enforcement action if there is a widespread perception that taking advantage of incentives reduces the prospect of such enforcement action. EPA's experience suggests that time limits for participation and the risk of follow-up inspections can encourage a rapid response from the regulated community.

b) **Preventing violations :** Compliance incentives, like compliance assistance, can be effective ways to provide opportunities for companies to prevent violations and maintain a high standard of care.

c) **Public recognition:** EPA's compliance incentive programs and policies can also be effective ways to publicly acknowledge and recognize effective environmental management, thereby

encouraging more companies to improve their environmental practices.

D. COMPLIANCE ASSISTANCE

1. Definition and Description

Compliance Assistance consists of information and technical assistance provided to the regulated community to help it meet the requirements of environmental law.² First and foremost, compliance assistance ensures that the regulated community understands its obligations by providing clear and consistent descriptions of regulatory requirements. Compliance assistance can also help regulated industries find cost-effective ways to comply through the use of pollution prevention and other innovative technologies.

Compliance assistance at EPA falls into broad categories, such as:

- a) **outreach** to the regulated community by EPA or through states through the use of compliance guides, seminars, information services and other means of assistance;
- b) **response** to requests for assistance, which may include asking EPA to determine the applicability of a particular regulation to a specific source, or more general inquiries to hotlines or information centers;
- c) **on-site assistance** such as compliance consultations or audits.

Compliance assistance is not a substitute for the regulated industries' responsibility to learn and comply with laws and regulations. It complements but does not replace appropriate enforcement.

2. Opportunities for Use

- a) **Compliance Education:** The most important goal of EPA's compliance assistance programs is to help regulated entities know what they are expected to do under the law and why.
- b) **New Regulations:** It is particularly important that compliance assistance support implementation of new rules. Indeed, the Small Business Regulatory Enforcement Fairness Act (SBREFA) requires the preparation of "plain-English" compliance guides to accompany any major new rules with a significant impact on small business and communities, and permits entities to cite these guides when documenting compliance in any enforcement action.
- c) **Assistance for Correcting Violations:** EPA may sometimes provide advice about

² Compliance assistance is distinguished from outreach or advice offered through voluntary programs like 33/50 and Green Lights which do not address legally enforceable requirements.

correcting violations during a compliance inspection or even during the negotiation phase of an enforcement action. Advice offered in the context of an inspection or enforcement action is limited by specific policies designed to protect the integrity of the enforcement proceeding.

d) Economies of Scale: Compliance assistance at EPA is generally (although not always) provided to targeted groups such as trade associations or states which can supply information to individual entities in the regulated community. This “wholesale” approach reflects economies of scale appropriate to the federal government, and avoids duplicating the on-site services offered by various state programs. EPA and other parts of the federal government provide funding for the kind of on-site consultation provided by states through such mechanisms as the Section 507 grants under the Clean Air Act.

e) Small Business/Small Community: Small businesses and small entities are often not as well equipped to comply with environmental laws as large, sophisticated corporations, and generally should have priority in the allocation of EPA’s limited resources for compliance assistance. Federal laws such as Section 507 of the Clean Air Act and SBREFA mandate specific services to small businesses and communities.

V. APPLYING THE TOOLS TO ENVIRONMENTAL PROBLEMS

The following considerations should be used in strategically selecting and applying the above tools:

- 1.** Environmental problems are defined broadly as actual, anticipated, or suspected:
 - 1) conditions which may harm the environment or public health; or 2) instances of noncompliance.
 - a)** The scope of environmental problems can be macro (i.e., international, national, state) or micro (i.e., local, community, facility).
 - b)** Environmental problems may be past, present, or future, and they may be one-time or recurring incidents.
 - c)** Environmental problems can appear in various contexts, including, but not limited to:
 - geographic locations (e.g. stretches of rivers, air basins, etc);
 - communities;
 - natural resources (e.g., an underground water supply);
 - an industry or an industrial process;
 - a company, government agency or a facility;
 - a particular chemical;
 - a commercial product;
 - a household threat;

- an endangered species or habitat; or
- a broad ecological threat (e.g., loss of wetlands)

2. Development of response strategies should be based on an analysis of the contexts, causes and effects of the problem, and an analysis of which tool(s) is likely to be most effective. However, environmental problems with similar circumstances should elicit consistent and fair application of the tools.
3. Development of response strategies should include consideration of all statutory authorities to determine if a single or multi-media approach might be most effective.
4. Tool selection and use is not necessarily step-wise (e.g., it is not necessary to try compliance assistance before resorting to enforcement). In many instances, one tool may solve a problem.
5. A response strategy solution may go beyond compliance, and may stimulate or compel other environmentally beneficial projects or practices.
6. As experience is gained in addressing environmental problems with these tools, regulators may redefine the problem, revise their current response strategy, or change how that tool(s) will be applied to other or future problems.

VI. COORDINATING AND/OR INTEGRATING FEDERAL, STATE, LOCAL, AND TRIBAL EFFORTS

EPA fully recognizes that it shares with all levels of government a common interest in environmental protection and compliance with environmental requirements. Indeed, under several of the core federal environmental statutes, implementation and enforcement are expressly shared by the federal, state, tribal, (and sometimes local) governments.

Coordination and/or integration of federal, state, local and tribal enforcement and compliance assurance efforts must be achieved in order to provide the most effective national environmental protection program. EPA, state, localities, and tribes each have capabilities and responsibilities unique or appropriate for their respective jurisdictions. The challenge of coordinating and integrating federal, state, local and tribal agency efforts is to build on the strengths of each, combine their capabilities and allocate responsibilities to produce an efficient and effective enforcement and compliance assurance effort.

There are at least three areas in which cooperative efforts between federal, state, local and tribal agencies foster a more cohesive and efficient approach to enforcement and compliance assurance:

- 1. Information sharing** about environmental conditions, threats to public health, noncompliance problems, patterns or incidents of behavior, and actions planned or taken. To be effective, government entities must communicate regularly, develop common performance measures and environmental indicators, actively input information into national data systems, and use this and other information to target problems, allocate resources, and measure effectiveness.
- 2. Collaborative planning and targeting** is also indispensable to an integrated program. EPA, states, locals and tribes should develop processes to jointly identify environmental priorities and problems worth addressing, develop strategies to address those problems, and allocate appropriate roles and responsibilities among agencies.
- 3. Coordinated strategies and actions** can be appropriate for EPA, state, local and tribal agencies as a means for sharing work on common environmental priorities and problems. In these instances, the use of enforcement activities, compliance monitoring, and compliance incentive and assistance activities should be coordinated, with lead and support responsibilities assigned, and without relinquishing independent authorities to enforce the law.

VII. MEASURING RESULTS AND IMPACTS

A major element of EPA's approach to enforcement and compliance assurance is to improve the methods to measure success. EPA has traditionally relied almost exclusively on counting activities (e.g., enforcement actions initiated, penalty dollars assessed) as its means of measuring success. Counting these activities provides a sense of "enforcement presence" in the regulated universe and the productivity (expressed as enforcement actions) of program resources.

EPA recognizes the need for a more sophisticated and comprehensive approach to measuring success. Development and implementation of this new approach is being guided by the following principles:

- 1.** EPA will strive to measure accomplishments for the full spectrum of enforcement and compliance assurance activities (i.e., enforcement actions, compliance monitoring, compliance assistance and incentives).
- 2.** EPA will continue to count enforcement activities as a measure of success, but will also measure the actual results and environmental impact of these and other activities.
- 3.** EPA will collect, analyze, and present information about: a) actions taken by regulated

parties in response to enforcement and compliance assurance activities; b) the benefits to human health and environment resulting from these activities; and c) the level of compliance in industry sectors.

4. EPA will continue to refine its measures of success to find those measures which are most meaningful for judging the effectiveness of EPA efforts and the performance of industry in achieving compliance.
5. EPA will report annually to the public on its enforcement and compliance assurance program.

**Operating Principles for an Integrated Enforcement and Compliance Assurance Program
Workgroup Members :**

Chair:

Michael M. Stahl

Deputy Assistant Administrator, OECA

Operating Principles Team:

Eric Schaeffer

Director, Office of Planning and Policy Analysis, OECA

Barry Breen

Director, Office of Site Remediation Enforcement, OECA

William Muszynski

Deputy Regional Administrator, Region 2

Marcia Mulkey

Regional Counsel, Region 3

Sam Coleman

Director, Compliance Assurance and Enforcement Division, Region 6

Senior Consultation Group:

Elaine Stanley

Director, Office of Compliance, OECA

Robert Van Heuvelen

Director, Office of Regulatory Enforcement, OECA

Earl Devaney

Director, Office of Criminal Enforcement, Forensics, and Training, OECA

Susan Bromm

Deputy Director, Office of Site Remediation Enforcement

Harley Laing

Director, Environmental Stewardship Division, Region 1

Laura Livingston

Enforcement Coordinator, Region 2

Gail Ginsberg

Regional Counsel, Region 5

Diane Callier

Director, Enforcement Coordination Office, Region 7

Carol Rushin

Director, Enforcement Division, Region 8

Stacey Eriksen

Enforcement Coordinator, Region 8

Staff:

Marie Muller, OECA